

Office of Chief Counsel  
Internal Revenue Service

**memorandum**

CC:LM:FSH:MAN:2:TL-N-206-01

JWFogelson

date:

to: Richard Fleming, Territory Manager  
Territory 1330, Group 1335  
Attention: May Look, Revenue Agent

from: Area Counsel (Financial Services and Healthcare)

subject:

Execution of Forms 872

Tax Years Ending During [REDACTED] through [REDACTED]

Statute of Limitations:

[REDACTED] - [REDACTED] Tax Years: [REDACTED] (per prior extension)  
& [REDACTED] Tax Years: [REDACTED] (per prior extension)  
Tax Year ending [REDACTED]: [REDACTED]  
[REDACTED] Tax Year: [REDACTED]

U.I.L. Nos. 6501.08-00, 6501.08-09, 6501.08-10, 6501.08-17

DISCLOSURE STATEMENT

This memorandum may contain return information subject to I.R.C. § 6103. This advice may contain confidential information subject to the attorney-client and deliberative process privileges and, if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the Examination or Appeals recipients of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to Examination or Appeals personnel or persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

This memorandum is not binding on Examination or Appeals and is not a final case determination. This memorandum is advisory and does not resolve Service position of an issue or provide the basis for closing a case. The determination of the Service in

this case is to be through the exercise of the independent judgment of the office with jurisdiction over the case.

This memorandum is in response to your request for assistance dated January 9, 2001 in the above-captioned matter concerning consents to extend the statute of limitations on assessment of income taxes for the tax years ending within the calendar years [REDACTED] through [REDACTED] of [REDACTED] (hereinafter "[REDACTED]") and its affiliated companies. This memorandum should not be cited as precedent.

### ISSUES

1. Who is authorized to execute consents extending the statute of limitations on assessment of income taxes (Forms 872) for [REDACTED] and its affiliated companies for their tax years ending within the calendar years [REDACTED] through [REDACTED]?

2. What language should be used in these Forms 872?

### CONCLUSIONS

1. Based on the representations of the taxpayers' counsel (i) that the acquisition of [REDACTED] and its affiliated companies by [REDACTED] ("[REDACTED]") on [REDACTED] was not a "reverse" acquisition as defined in Treas. Reg. § 1.1502-75(d), and (ii) that the date of the "transfer of assets" for purposes of I.R.C. § 381(b) by [REDACTED] resulting from this acquisition was [REDACTED], [REDACTED] is authorized to execute a Form 872 extending the statute of limitations on assessment of income taxes for itself and its affiliated companies for their tax years ending [REDACTED], [REDACTED], [REDACTED], and [REDACTED]. Based on these representations, [REDACTED] is authorized to execute a Form 872 extending the statute of limitations on assessment of income taxes for itself and its affiliated companies (including [REDACTED] and its affiliated companies) for their tax years ending [REDACTED].

2. Set forth below on pages 8 and 9 is suggested language to be included in (i) the consent to be executed by [REDACTED] for itself and its affiliated companies for their tax years ending [REDACTED], [REDACTED], [REDACTED], and [REDACTED], and (ii) the consent to be executed by [REDACTED] for itself and its affiliated companies (including [REDACTED] and its affiliated companies) for their tax years ending [REDACTED].

### FACTS

This opinion is based on the facts set forth herein. It might change if the facts are determined to be incorrect. If the facts are determined to be incorrect, this opinion should not be relied upon. You should be aware that, under routing procedures which have been established for opinions of this type, we have referred this memorandum to the Office of Chief Counsel for review. That review might result in modification to the conclusions herein. We will inform you of the result of the review as soon as we hear from that office, which should be in approximately ten days. In the meantime, the conclusions reached in this opinion should be considered to be only preliminary.

██████ (E.I.N. ████████) filed consolidated income tax returns on behalf of itself and its affiliated corporations (hereinafter the "██████") for the ████████'s "consolidated return years," as defined in Treas. Reg. § 1.1502-1(d), ending ████████, ████████, and ████████. During these years, ████████ was the "common parent," within the meaning of I.R.C. § 1504(a) and Treas. Reg. §§ 1.1502-1(b) and (c), of the ████████.

██████ was acquired by ████████ (E.I.N. ████████) on ████████ in a reorganization described in I.R.C. §§ 368(a)(1)(A) and 368(a)(2)(e), i.e., a reverse triangular merger. In the year ████████, ████████ changed its name to ████████ and is hereinafter referred to as "██████." (██████'s E.I.N. is also ████████.) The group of affiliated companies for which ████████ filed a consolidated income tax return for the consolidated return year beginning ████████ and ending ████████ is hereinafter referred to the "██████."

██████ has previously executed Forms 872 (i) extending through ████████ the statute of limitations on assessment of income taxes for all members of the ████████ for their tax years ending ████████, ████████, and ████████, and (ii) extending through ████████ the statute of limitations on assessment of income taxes for all members of the ████████ for their tax years ending ████████ and ████████.

██████ filed the ████████'s consolidated income tax return for the consolidated return year ending ████████ on ████████. Also on ████████, ████████ filed a consolidated income tax return for the ████████'s consolidated return year ending ████████, which purported to include the former ████████'s members' items of income, gain, deduction, loss, and credit for the period starting ████████ and ending ████████. The assessment

limitations periods for the tax years covered by the consolidated income tax returns filed by [REDACTED] and [REDACTED] on [REDACTED] have not previously been extended and are due to expire on [REDACTED].

[REDACTED] and [REDACTED] are both corporations formed under the laws of Delaware.

[REDACTED]'s acquisition of [REDACTED] and its affiliated companies took place on [REDACTED]. Pursuant to a merger agreement (hereinafter the "[REDACTED] Merger Agreement"), on that date [REDACTED] acquired [REDACTED] (and its affiliated companies) in a reverse triangular merger described in I.R.C. §§ 368(a)(1) and 368(a)(2)(E). In this transaction, (i) a subsidiary of [REDACTED], newly formed under the laws of Delaware, exchanged shares of [REDACTED] for shares of [REDACTED], and (ii) the newly formed subsidiary then merged into [REDACTED]. As a result, [REDACTED] became a first-tier subsidiary of [REDACTED] and the other members of the [REDACTED] became lower-tier subsidiaries of [REDACTED].

Article I, section 1.4 of the [REDACTED] Merger Agreement states that the effect of the merger shall be as provided in the applicable provisions of Delaware law and that all liabilities of [REDACTED] shall continue to be liabilities of [REDACTED] as the surviving corporation in the merger. Article I, section 1.6, of the [REDACTED] Merger Agreement provides: (i) that generally the Certificate of Incorporation of [REDACTED] as the corporation surviving the merger shall be the Certificate of Incorporation of [REDACTED] as in effect immediately prior to the merger, (ii) that generally the Bylaws of [REDACTED] as the corporation surviving the merger shall be the Bylaws of [REDACTED] immediately prior to the merger, and (iii) that generally the directors and officers of [REDACTED] immediately prior to the merger shall continue to so serve in the surviving corporation.

[REDACTED]'s counsel has advised the Service that the separate corporate existences of both [REDACTED] and [REDACTED] continue through today. [REDACTED]'s counsel has also advised the Service that [REDACTED]'s acquisition of [REDACTED] in the reverse triangular merger described above was not a reverse acquisition as defined in Treas. Reg. § 1.1502-75(d) because [REDACTED]'s former shareholders did not receive, as a result of [REDACTED]'s acquisition of shares of [REDACTED], more than 50% of the [REDACTED] shares outstanding immediately after the reverse triangular merger. [REDACTED]'s counsel has further advised the Service that the date of the transfer of assets by [REDACTED] for purposes of I.R.C. § 381(b) was [REDACTED].

For purposes of this memorandum, we have relied on the representations by [REDACTED]'s counsel described in the immediately

preceding paragraph are correct. Based on these representations, pursuant to I.R.C. § 381(b)(1), the tax year commencing [REDACTED] of each member of the [REDACTED] ended on [REDACTED], when, consistent with Treas. Reg. § 1.1502-75(d), the existence of the [REDACTED] terminated and its members became members of the [REDACTED]. Further, based on these representations, [REDACTED] was the common parent of the [REDACTED] during all of [REDACTED] and the [REDACTED]'s consolidated income tax return for the group's consolidated return year ending [REDACTED] was required to include the items of income, gain, deduction, loss, and credit of [REDACTED] and the other former members of the [REDACTED] for the period starting [REDACTED] and ending [REDACTED]. See Treas. Reg. § 1.1502-76(b)(1)(i), which provides that a consolidated income tax return must include the common parent's items of income, gain, deduction, loss, and credit for the entire consolidated return year and each subsidiary's items for the portion of the year for which it is a member of the affiliated group filing the consolidated return.

#### DISCUSSION

1. Who is authorized to execute Forms 872 for [REDACTED] and the other members of the former [REDACTED] for their tax years ending within the calendar years [REDACTED] through [REDACTED]?

I.R.C. § 6501(a) provides generally that the amount of any tax shall be assessed within three years after the relevant tax return was filed. Under I.R.C. § 6501(c)(4), the Service and a taxpayer may consent in writing to an extension of the time for making an assessment if the consent is executed before the expiration of the previously existing period, i.e., either the original statutory period set forth in I.R.C. § 6501(a) or an extended period established in a prior written extension agreement between the parties. A Form 872, Consent to Extend the Time to Assess Tax, is used to so extend the limitations period.

Pursuant to Treas. Reg. § 1.1502-77(a), the common parent of a group of affiliated corporations filing a consolidated income tax return for a particular consolidated return year is the sole agent for each member of the group and, as such, is authorized to act in its own name in all matters relating to each group member's income tax liability for its tax year included in that consolidated income tax return. Pursuant to Treas. Reg. § 1.1502-77(c), unless there is an agreement to the contrary, a Form 872 entered into by a group's common parent for a particular consolidated return year will apply to extend the period of limitations on assessment of income tax for the tax year of each group member included in that consolidated return.

Further, under Treas. Reg. §1.1502-77(a), a consolidated group's common parent for a particular consolidated return year remains the sole agent for the other members of the group for such year so long as the common parent continues its corporate existence, whether or not consolidated returns are filed in subsequent years and whether or not one or more subsidiaries have become or have ceased to be members of the group. See Treas. Reg. §1.1502-77(a); Southern Pacific v. Commissioner, 84 T.C. 395, 401 (1985).

In this case, because [REDACTED]'s corporate existence continues, [REDACTED] remains the agent for the other members of the [REDACTED] that joined in the consolidated income tax returns filed by [REDACTED] for the consolidated return years ending [REDACTED], [REDACTED], [REDACTED], and [REDACTED].<sup>1</sup>

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<sup>1</sup> That [REDACTED]'s corporate existence continued after its acquisition by [REDACTED] can be seen from the terms of the [REDACTED] Merger Agreement discussed above and applicable state law. With respect to a merger of two or more Delaware corporations, § 251(a) of the General Corporation Law of the State of Delaware provides, in part, that:

Any 2 or more corporations existing under the laws of this State may merge into a single corporation, which may be any 1 of the constituent corporations ... pursuant to an agreement of merger ... complying and approved [by the corporations and their shareholders] in accordance with this section. Del. Code Ann., tit. 8, § 251(a) (2000).

Also with respect to such a merger, General Corporation Law § 259(a) provides, in part, that:

When any merger ... shall have become effective under this chapter, for all purposes of the laws of this State the separate existence of all the constituent corporations ... except the one into which the other or others of such constituent corporations have been merged ... shall cease and the constituent corporations shall ... be merged into 1 of such corporations, ... and all debts, liabilities and duties of the respective constituent corporations shall thenceforth attach to said surviving ... corporation, and may be enforced against it

Because [REDACTED] still exists, under Treas. Reg. §1.1502-77(a), [REDACTED] is the proper entity to execute a Form 872 on behalf of itself and each member of the [REDACTED] for each consolidated return year of the [REDACTED] during which it was the group's common parent. As discussed above, based on the representations made by [REDACTED]'s counsel that (i) [REDACTED]'s acquisition of [REDACTED] was not a reverse acquisition, and (ii) the date of the I.R.C. § 381(b) transfer of assets by [REDACTED] was [REDACTED], [REDACTED] is authorized to execute a Form 872 extending the statute of limitations on assessment of income taxes for each member of the [REDACTED] for the group's tax years ending [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED].

However, as a result of [REDACTED]'s acquisition of the [REDACTED] on [REDACTED], the [REDACTED] ceased to exist as of [REDACTED], [REDACTED] ceased to be the common parent of any affiliated group, and the members of the former [REDACTED] (including [REDACTED]) became members of the [REDACTED]. Accordingly, under Treas. Reg. §1.1502-77(a), [REDACTED] is the proper entity to execute a Form 872 for the tax years ending [REDACTED] of the members of the [REDACTED] (including the tax years ending [REDACTED] of the former members of the [REDACTED]). This is because [REDACTED] was the common parent of the [REDACTED] during the group's tax years ending [REDACTED].<sup>2</sup>

Neither I.R.C. § 6501(c)(4) nor the regulations thereunder specify who may sign consents. The Service therefore applies the

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to the same extent as if said debts, liabilities and duties had been incurred or contracted by it. Del. Code Ann., tit. 8, § 259 (2000).

<sup>2</sup> On [REDACTED], pursuant to a merger agreement, [REDACTED] acquired shares of [REDACTED] (hereinafter "[REDACTED]") in another reverse triangular merger described in I.R.C. §§ 368(a)(1) and 368(a)(2)(E). [REDACTED]'s counsel has represented to us that this transaction was structured similarly to [REDACTED]'s acquisition of [REDACTED] in that (i) a newly formed subsidiary of [REDACTED] exchanged shares of [REDACTED] for shares of [REDACTED]; and (ii) the newly formed subsidiary then merged into [REDACTED], so that [REDACTED] became a first-tier subsidiary of [REDACTED]. [REDACTED]'s counsel has further represented that [REDACTED]'s acquisition of [REDACTED] was not a reverse acquisition and that, after [REDACTED]'s acquisition of [REDACTED], [REDACTED] remained a first-tier subsidiary of [REDACTED]. [REDACTED]'s acquisition of [REDACTED] on [REDACTED] has no effect on the issues addressed in this memorandum.

rules applicable to the execution of the original returns to the execution of Forms 872. Rev. Rul. 83-41, 1983-1 C.B. 399, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305.

I.R.C. § 6061 provides that any return, statement or other document made under any internal revenue law must be signed in accordance with the applicable forms or regulations. I.R.C. § 6062 provides that a corporation's income tax return must be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to act on behalf of the corporation. Accordingly, any such corporate officer may sign a Form 872, whether or not that individual signed the related corporate income tax return. Rev. Rul. 84-165, 1984-2 C.B. 305.

Based upon the above, a Form 872 extending the assessment limitations period for the tax years ending [REDACTED], [REDACTED], and [REDACTED] of each member of the [REDACTED] should be executed by an authorized officer of [REDACTED]. A Form 872 extending the assessment limitations period for the tax year ending [REDACTED] of each member of the [REDACTED] should be executed by an authorized officer of [REDACTED].

2. What language should be used in these Form 872s?

We suggest that the following language be used in a Form 872 to extend the [REDACTED]'s tax years ending [REDACTED], [REDACTED], and [REDACTED]:

[REDACTED] (EIN: [REDACTED]), as agent for [REDACTED]\*

Further, we suggest the following language for the footnote:

\* - With respect to the consolidated liabilities of [REDACTED] ending [REDACTED], [REDACTED], and [REDACTED].

We suggest that the following language be used in the Form 872 to extend the [REDACTED]'s tax years ending [REDACTED]:

[REDACTED] (EIN: [REDACTED]), as agent for [REDACTED]\*

Further, we suggest the following language for the footnote:



\* - With respect to the consolidated liabilities of [REDACTED] for taxable years ending [REDACTED].

As discussed above, if such a Form 872 is timely executed by [REDACTED] and the Service, it will extend the limitations period applicable to the assessment of income tax related to the items of income, gain, deduction, loss, and credit of each former [REDACTED] member for the period of [REDACTED] through [REDACTED] because those items are required to be included in [REDACTED]'s consolidated income tax return for the [REDACTED]'s consolidated return year ending [REDACTED].

#### PROCEDURAL CONSIDERATIONS

Please note that Section 3461 of the I.R.S. Restructuring and Reform Act of 1998, codified in I.R.C. § 6501(c)(4)(B), requires the Service, each time that it requests a taxpayer to extend the limitations period, to advise the taxpayer of the right (i) to refuse to extend the statute of limitations on assessment, or, in the alternative, (ii) to limit an extension to particular issues or for specific periods of time,. To satisfy this requirement, you may provide Publication 1035, "Extending the Tax Assessment Period," to the taxpayers when you solicit the consents. Alternatively, you may advise the taxpayers orally or in some other written form of the I.R.C. § 6501(c)(4)(B) requirement. In any event, you should document your actions in this regard in the case files.

In addition to the recommendations made herein, we further recommend that you pay strict attention to the rules set forth in the IRM. Specifically, the IRM requires use of Letter 907(DO) to solicit a Form 872, Letter 928(DO) as a follow-up letter to Letter 907(DO) (when appropriate), and Letter 929(DO) to transmit a copy of the executed consent to the taxpayer. See IRM Handbook No. 121.2.22.3 and No. 121.2.22.4.2. Dated copies of both letters should be retained in the case file(s) as directed. When the signed Forms 872 are received from the taxpayers, the responsible manager should promptly sign and date them in accordance with Treasury Regulation § 301.6501(c)-1(d) and IRM, Handbook No. 121.2.22.5.10. The manager must also update the respective statutes of limitations in the continuous case management statute control files and properly annotate Form 895 or equivalent. See IRM, Handbook No. 121.2.22.5.11(1)(g). In the event a Form 872 becomes separated from the file or lost, these other documents would become invaluable to establish the agreement.

This advice relates solely to the facts of this case and should not be used or applied to the facts of any other case. If

you have any questions concerning this memorandum, please contact Joseph W. Fogelson at (212) 264-1595, ext. 224.

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ROLAND BARRAL  
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By: \_\_\_\_\_  
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